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RESTITUTIONARY REMEDIES IN THREE-PARTY CASES: A COMPARATIVE PERSPECTIVE

John D. McCamus*

I. INTRODUCTION

Almost all of the discussion in the secondary literature concerning restitutionary remedies deals with, what might be labeled as, two-party cases. That is, the typical restitution claim arises in a situation where the claimant has conferred value on a defendant, which the claimant asserts it is unjust for the defendant to retain. Those who follow the American or Restatement[1] model for the structure of the law of restitution also would include, as part of this subject, two-party cases in which the defendant has become enriched by dealings with third parties, which constitute a breach of a duty owed to the claimant. A prime and simple example would be the breach of a fiduciary

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1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW. INST. 2011) [hereinafter RESTATEMENT THIRD]; RESTATEMENT (FIRST) OF RESTITUTION, QUASI-CONTRACTS, AND CONSTRUCTIVE TRUSTS (AM. LAW. INST. 1937) [hereinafter RESTATEMENT FIRST].

obligation owed by the defendant to the claimant which is constituted by dealings with third parties which have generated a profit in the hands of the defendant. Though one could obviously characterize these as "three-party" situations, in the sense that the source of the defendant's unjust enrichment is a third party, I will not do so for present purposes on the basis that these are situations in which the unjust retention directly results from the wrongdoing of the defendant who has breached a duty owed to the plaintiff.

The present topic concerns three-party situations in a rather different sense. These are situations where a third party has transferred value to the defendant, which, for reasons of justice, ought to have been or should now be transferred to the plaintiff. As we shall see, such cases may or may not involve wrongful conduct by the third party. Where the value has been transferred to the defendant, however, the plaintiff might be said to have a better claim to the enrichment than does the defendant. These types of cases are much less discussed in the literature and, I suspect, much less familiar to the profession at large. Nonetheless, there are, both historically and in contemporary circumstances, many cases of this kind and their proper resolution as a matter of some interest.

This paper will examine the traditional English position concerning such claims and contrast that doctrine with more recent developments in American and Canadian restitutionary doctrine. The principal point of comparison is that American and Canadian doctrine allows restitutionary relief in a much broader range of three-party cases. With particular reference to Canadian doctrine, it is of interest that there appear to be a substantial number of Canadian cases providing relief in situations quite similar to those found in American law. This appears to be the case notwithstanding the fact that there is no obvious evidence of American influence in the sense of reliance on American authorities in the development of Canadian law in three-party cases.

A complication found in Canadian law finds no parallel in American doctrine and, for a time at least, threatened to preclude a recovery in at least some three-party cases. Nonetheless, a recent Supreme Court of Canada decision, *Moore v. Sweet*,[2] to be further considered below, has flatly rejected this possibility, and it now appears that Canadian and American doctrine run along quite similar lines. This might be considered to be some evidence in support of the proposition that there is merit in the position taken in the American and Canadian cases which, in turn, might provide a basis for reconsideration of some aspects of English doctrine.

The paradigm two-party case, for pedagogical purposes at least, is the simple case of a mistaken payment. The claimant has paid money to the defendant as a result of a mistake of some kind. For centuries, the common

2 Moore v. Sweet, [2018] S.C.R. 52 (Can.).

law has allowed recovery subject, at least in more recent years in English and Canadian experience, to the ability of the defendant to raise a change of position defense. It may well be that the paradigm case for a practitioner, in the sense that it is the type of case more frequently encountered, is the transfer of value under an agreement which is unenforceable for some reason. In such cases, benefits conferred through contractual performance are usually, though not invariably, recoverable. The simple mistaken payment claim, however, has the appeal of simplicity for analytical purposes. To consider the prospect of a three-party claim in the context of a mistaken payment, one may imagine that the mistake in question has the effect of inducing the payer to make the payment to the wrong party. The question to be considered here, then, is whether the party who should have received the payment is entitled to bring a restitution claim against the party who actually did receive the payment. We may note in passing that, in the making of the payment, neither the third party, the mistaken payer, nor the recipient defendant have engaged in the breach of a duty owed to the plaintiff, the intended recipient. It is well established, of course, that the mistaken payer has a claim against the recipient. It is much less clear in English and Canadian law whether the intended recipient has such a claim.

II. THE TRADITIONAL ENGLISH POSITION

The unifying theme of traditional English law on restitutionary remedies in three-party situations is that relief is typically available only where the third party has obtained a benefit from the claimant through wrongful conduct of some kind and has then passed it on to the defendant. Such claims have been recognized both at common law and in equity, and the following brief synopsis[3] will therefore distinguish between common law and equitable claims.

At common law, relief is typically afforded in circumstances where a third party has misappropriated funds from the claimant and has, in some fashion, passed it on to the third party. In some cases, the misappropriation may amount to theft. In others, it may constitute a breach of contract or the tort of conversion. Where the miscreant is an employee of the claimant, the misappropriation may amount to a wrong of all three kinds. A leading eighteenth century authority may come within this category. In *Clarke v. Shee & Johnson*,[4] the plaintiff brewer had an employee, his clerk, who had diverted sums intended for the employer that had come into his possession in the ordinary course of business. The employee then paid the misappropriated

3 For more extensive treatment, see ANDREW BURROWS, THE LAW OF RESTITUTION 19 (3d ed. Oxford University Press 2011); P.D. MADDAUGH & J.D. MCCAMUS, THE LAW OF RESTITUTION ch. 36 (looseleaf ed. 2019).

4 Clarke v. Shee & Johnson (1774) 98 Eng. Rep. 1041.

funds to the defendant in return for lottery tickets. The latter transaction was unlawful under the legislation then applicable to lotteries. Lord Mansfield, with three concurrences, allowed a "money had and received" claim by the employer against the supplier of the lottery tickets on the basis that the common law claim in money had and received, rather like a bill in equity, would lie where it was against "conscience" that the defendant retained the sums in question.[5] It was significant that the transaction between the employee and the defendant was unlawful as otherwise, the Court observed, the defendant would be able to raise a *bona fide* purchaser defense. Lord Mansfield did observe that the claimant was the "true owner" of the funds.[6] Accordingly, it has long been assumed that such claims would lie only where a proprietary link could be established between the claimant and the funds transferred to the defendant. The recovery, it should be noted, is nonetheless personal in nature rather than proprietary.

The concern to establish a proprietary connection concerning the transferred assets is also evident in the leading modern English authority, *Lipkin Gorman v. Karpnale Ltd*.[7] Again, the claim concerned funds misappropriated by the third party. In this case, the third party was a partner, a Mr. Cass, in the plaintiff firm of solicitors who misappropriated partnership funds and spent the money (and lost most of it) gambling at a facility operated by the defendant in London, known as the "Playboy Club." The firm sought restitution of the funds gambled away by Cass from the Club. The principal significance of this decision for this area of the law is that it was the occasion on which the House of Lords first plainly recognized the existence of a change of position defense. In granting relief, based on the *Clarke v. Shee & Johnson* line of authority, the Court satisfied itself that the transactions at the Playboy Club were unenforceable, thus depriving the defendant of a *bona fide* purchaser defense. As Cass's gambling activity was not completely unsuccessful, he had enjoyed some winnings. The House of Lords applied a change of position defense in the defendant's favour with respect to the monies it had paid out to Mr. Cass.[8]

Establishing a proprietary link between the funds misappropriated from the firm by Cass and the monies paid to the Playboy Club and, further, by the firm to the monies still remaining in the hands of the Playboy Club would have been a challenging exercise. Nonetheless, the House of Lords appeared to assume that it was necessary to establish that the firm retained title to the funds advanced by Cass to the Playboy Club. Cass had also spent some of his own resources in gambling at the Playboy Club. Whether or not a mixing had

5 *Id.* at 1041–42.

6 *Id.* at 1042.

7 *See* Lipkin Gorman v. Karpnale Ltd. [1991] A.C. 548 (HL) (appeal taken from Eng.).

8 *Id.* at 579.

occurred was apparently unclear but, if it had occurred, it would have complicated a tracing exercise. The matter was satisfactorily resolved, however, by the defendant's concession that the plaintiff retained title to the monies advanced to the club by Cass. To the extent it might have been necessary to demonstrate that the club had retained or been enriched by the firm's monies, a number of complications could have arisen. Apart from the question of Cass mixing the firm's monies with his own, it was the Club's practice to issue chits in return for monies advanced by customers and then to cash out whatever chits remained in the hands of gamblers at the end of their gambling sessions. Further, it was apparently the practice of Cass to spend his winnings in further gambling at the Club. Again, these difficulties were resolved by a concession made by the Club that a specific amount of money, in their view, constituted the surplus retained by the Club after making appropriate deductions to account for these complexities.[9] With these matters resolved, Lord Goff was able to conclude that the *Clarke* precedent was controlling and that the firm was entitled to recover the amount in question from the defendant Club. Lord Goff observed that the club "cannot in conscience retain the money—or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money."[10]

In summary, then, the common law doctrine allows the recovery of monies misappropriated from a claimant by a third party who then passes on the funds in question to the eventual defendant, provided that the defendant cannot raise a defense of *bona fide* purchase or of change of position. It remains contentious in English law, however, whether such recovery is limited to situations in which a claimant can establish a proprietary connection to the funds eventually transferred to the defendant by the third party. Another possible view is that this would be merely one way of establishing that the benefit acquired by the defendant had been "at the expense" of the claimant but that it might not necessarily be the only way of doing so. Thus, for example, on the *Lipkin Gorman* facts, it might have been possible to establish that, but for the misappropriation, Cass could not have afforded to gamble as enthusiastically as he did at the Club. Indeed, it may be that an assumption of this kind provided a basis for the Club's concession on the matter.

On the equity side, the principal vehicle for imposing liability on remote recipients of wrongfully acquired benefits is the law of fiduciary obligation. The two doctrines achieving this objective are usually referred to as "knowing assistance" and "knowing receipt." Of the two, it is the latter that is particularly of present interest. The doctrine of "knowing assistance"

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9 *Id.* at 569.

10 *Id.* at 572.

imposes liability on third parties who have, in some fashion, participated in a breach of fiduciary obligation either by facilitating the misconduct or by inducing it. Essentially, then, it is a form of accessory liability and is not, in fact, dependent on establishing that the defendant received any trust assets as a result of his conduct. The doctrine of "knowing receipt," on the other hand, is applicable to a defendant who is the recipient of trust assets misappropriated by the third party by means of a breach of fiduciary obligation. The remedy in "knowing receipt" cases then is plainly restitutionary in nature. Indeed, the Supreme Court of Canada, in a modern leading case, held that the doctrine of "knowing receipt" is to be included within the law of unjust enrichment.[11]

By way of distinguishing the two different forms of liability, it might be said that the doctrine of "knowing assistance" is "fault-based"; whereas, the doctrine of "knowing receipt" might be said to be "receipt-based." On the other hand, both doctrines might be considered to involve an element of fault inasmuch as, in each case, it must be established that there is some form of knowledge or awareness on the part of the defendant that a fiduciary breach has occurred. To establish a claim of "knowing assistance," the plaintiff must establish that the plaintiff had "actual knowledge" of the circumstances giving rise to the breach of fiduciary obligation. In a "knowing receipt" case, however, the knowledge required is of a lesser standard. It is said that in a case of "knowing receipt," the defendant must have had constructive knowledge of the breach of fiduciary obligation, that is "knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry."[12]

In a knowing receipt claim, then, the plaintiff must establish constructive knowledge on the part of the defendant recipient. Further, the plaintiff must establish that the benefit transferred to the defendant constituted an asset of the claimant.[13] That is to say, it is plainly established that in this context a proprietary link between the claimant's asset and the asset received by the recipient is a necessary pre-requisite to recovery. Further, it must be established that the recipient acquired the claimant's asset for the recipient's personal use. Thus, it would not be sufficient for the recipient to have received the asset as an agent for another party.

The need for a proprietary link in "knowing receipt" cases provides an explanation for the fact that the normal remedy made available in such cases is that of constructive trust. In this respect, the equitable doctrine differs from the doctrine at common law. At common law, as we have noted, the remedy

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11 Citadel Gen. Assurance Co. v. Lloyds Bank Can., [1997] 3 S.C.R. 805 (Can.).

12 Air Can. v. M & L Travel Ltd., [1993] 3 S.C.R. 787, 812 (Can.); *see Citadel Gen. Assurance*, 3 S.C.R. at para. 22.

13 MADDAUGH & MCCAMUS, *The Elements of "Knowing Receipt"*, *in* THE LAW OF RESTITUTION, *supra* note 3, at cmt. 36, heading 36:300.20.

is personal in nature even though, albeit with some contention, recovery at common law rests on establishing a proprietary connection between the plaintiff and the assets transferred ultimately to the defendant.

In summary, then, both at common law and in equity, restitution is allowed in three-party cases where the claimant's assets have been misappropriated by a third party and then passed on by the third party to the defendant. The common law cases deal essentially with cases of breach of contract, theft, and tortious misconduct by the third party. The equity cases deal principally with breach of fiduciary obligation. We should notice that both of these doctrines are of no assistance in our paradigm case of a mistaken payment. Where monies have been mistakenly paid by A to B when, in fact, A actually intended to pay the monies to C, B has not engaged in wrongful conduct resulting in the receipt of the mistakenly paid monies. Thus, there is no basis for a restitutionary three-party claim by C against B under these common law and equity doctrines. Oddly, however, there is one lonely instance in which C can recover from B monies mistakenly paid by A to B and that is in the context of estates administration. In the famous case of *Re Diplock*,[14] the executors of the rather large estate of one Caleb Diplock, mistakenly interpreted the will and distributed large amounts of money to as many as 139 different charities, including numerous hospitals and schools. An action brought by the next of kin, who were the proper recipients of the monies in question, against the charities, enjoyed success. In other words, in a case where the executors mistakenly paid monies to a group of defendants, the intended recipients of the monies were granted a direct claim against the improper recipients. Thus far, however, English law has not generalized the proposition evidently applied in *Diplock* and recognized that there exists a general rule that in a mistaken payment case, the intended recipient of the monies paid can bring a restitution claim against the unintended recipient.

In the English law of restitution relating to third party cases, then, there remain some interesting points of difficulty. First, both at common law and in equity, it may be asked whether it is appropriate, as a matter of principle, to require a proprietary link between the claimant and the assets received by the defendant. That is, should it be necessary to show that the claimant is the owner of the assets so received whether at common law or in equity. Second, it may be asked whether the rule in *Re Diplock* ought to be extended to mistaken payment cases more generally. Third, the requirement of constructive notice in "knowing receipt" cases remains contentious. With respect to the latter point, there is now an extended debate in the academic literature as to whether constructive notice ought to be required in such cases. We may note that there is no such requirement in common law three-party

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14 Diplock v. Wintle (Re Diplock), [1950] 2 All ER 1137 (Can. H.L.), *aff'd sub nom.* Ministry of Health v. Simpson [1951] AC 251 (HL).

cases. Thus, there is no requirement in a case like *Clarke v. Shee and Johnson*[15] that the supplier of the lottery tickets was aware that the monies used to pay for them were misappropriated by the brewer's clerk. Those who favour "strict" liability as a general matter, including in "knowing receipt" cases, make the argument that the legitimate interests of the recipient in three-party cases are adequately protected by the *bona fide* purchaser and change of position defenses. These defenses are, of course, recognized at common law and may be thought to provide a principled basis for imposing strict liability in that context. If one asks what the legitimate interests of the recipient of monies might be in such cases, they would appear to be precisely analogous to the interests of a recipient of mistakenly paid monies. If the recipient had received the monies under a valid transaction, there is obviously an interest in protecting the sanctity or integrity of such transactions. This interest of the defendant is adequately protected, however, by the *bona fide* purchaser defense. Further, the recipient who lacks knowledge of the problem relating to the initial acquisition of the funds has an interest in not suffering as a result of detrimental reliance on the receipt of the monies. This interest, of course, is adequately protected by the change of position defense. There does not appear to be a need for any additional protection to the interests of recipients in the context of knowing receipt. Accordingly, it is argued, the strict liability applicable in common law should be extended into the equity context, provided that both the *bone fide* purchase and change of position defenses are recognized as being available in the equity context.[16] Such arguments, however, have not yet had an influence on the English law of knowing receipt.

III. EXPANDING THE SCOPE OF SUCH RELIEF: AMERICAN AND CANADIAN CASES

For purposes of concision, I will simply assume, without further documentation, that remedies that would be available in three-party cases covered by traditional English doctrine are also available in both American and Canadian law. Of greater interest, however, are situations in which recovery would be available in Canadian[17] and American[18] jurisprudence where there appears to be no parallel in English law. A brief sketch of such cases will be provided here.

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15 Clarke v. Shee & Johnson (1774) 98 Eng. Rep. 1041.

16 *See, e.g.*, Peter Birks, *Misdirected Funds: Restitution from the Recipient*, LLOYD'S MAR. & COM. L.Q. 296 (1989); Lord Nicholls, *Knowing Receipt: The Need for a New Landmark*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 231 (W.R. Cornish et al. eds., Oxford, Hart Pub., 1998); *cf.* Rohan Havelock, *The Transformation of Knowing Receipt*, 22 REST. L. REV. 1 (2014).

17 *See* MADDAUGH & MCCAMUS, *supra* note 3, cmt. 35.

18 For more extensive treatment, see RESTATEMENT THIRD, *supra* note 1, at vol. 2, ch. 6.

The *Restatement Third* brings together comprehensively, perhaps for the first time, three-party cases of the kind under consideration here. Section 48 articulates a general principle underlying these cases in the following form:

> "Payment to Defendant to Which Claimant Has a Better Right."
> If a third person makes a payment to the defendant in which (as between claimant and defendant) the claimant has a better legal or equitable right, the claimant is entitled in restitution from the defendant as necessary to prevent unjust enrichment.

The cases gathered together as illustrations of this principle or rule may be conveniently subdivided into a number of headings, many of which may overlap to some extent. A brief synopsis with American and Canadian illustrations follows.

A. Claimant Has Borne an Expense for Which the Defendant Has Been Reimbursed

A typical example falling within this category arises in circumstances where tax payments are reimbursed for some reason by the taxing authority, but are not reimbursed to the party who had actually paid or borne the burden of the tax in the first place. A simple illustration based on American authority[19] involves the collection and reimbursement of federal taxes on products provided to consumers. The supplier charges the applicable tax to the customer and remits it to the federal authority. Subsequent litigation involving other taxpayers results in a decision that the particular product is not properly considered to be subject to the tax. The federal authority then remits tax payments to payers, including the particular supplier. The customer, who had actually borne the burden of the tax, is able to seek restitution of the taxes reimbursed from the supplier. A similar Canadian case[20] involved the payment of taxes on building materials by a general contractor, as was required by the building contract. The employer of the contractor was a university. When subsequent federal legislation reimbursed universities with respect to taxes paid on building materials, the general contractor successfully brought a restitution claim against the university for the taxes paid by the contractor and subsequently reimbursed to the university.

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19 *See* Wayne Cty. Produce Co. v. Duffy-Mott Co., 155 N.E. 669 (N.Y. 1927).

20 *See* James More & Sons Ltd. v. Univ. of Ottawa (1975), 5 O.R. 2d 162 (Can. Ont. H.C.J.).

Another Canadian authority[21] indicates that this proposition extends beyond the context of tax reimbursements. A supplier of parts to the manufacturer of equipment to be supplied by the manufacturer to a third party had completed work in progress by the time the contract between the manufacturer and the third party unexpectedly terminated. Under that agreement, the manufacturer was entitled to compensation for work in progress. The manufacturer claimed, as part of the work in progress, the work performed by the parts supplier. The parts supplier successfully sought restitution of the amounts reimbursed to the manufacturer that related to the otherwise uncompensated work in progress of the parts supplier.

B. Defendant Intercepts Benefits Pertaining to Proprietary or Other Entitlements of the Claimant

Historically, there are a number of lines of authority, including English authority, dealing with situations where the defendant has acquired a benefit, typically money, that pertains in some sense to ownership rights or other forms of entitlement of the claimant. A simple illustration relates to misdirected rental payments.[22] Thus, if A mistakenly pays rent to B, thinking that B is the owner of the property, whereas, in fact, C is the owner of the property, C has a good restitutionary claim against B for the monies received. Similar issues may arise in the context of co-ownership of land and, again, lines of authority allowing recovery are found in all jurisdictions.[23] Other venerable lines of authority relate to claims of office holders who are entitled to certain fees or profits in cases where such monies are collected by usurpers of those offices. Similarly, in the context of estates administration, one who purports to collect monies owing to deceased on behalf of the estate must account for the monies received to the duly appointed representatives of the estate.[24]

Cases that are not covered by the traditional authorities often arise in the context of transfers of ownership. In a Canadian case,[25] an owner of real property contested a municipal tax assessment. Before that application was resolved, however, the owner sold the property to the defendant. After the closing of the transaction, it was decided by the appropriate authority that a

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21 *See* Stevested Mach. & Eng'g Ltd. v. Metso Paper Ltd. (2014), 372 D.L.R. 4th 112 (Can. B.C. C.A.).

22 Arris v. Stukeley (1677) 86 Eng. Rep. 1060 (KB).

23 *See* MADDAUGH & MCCAMUS, *supra* note 3, at heading 35:500 "Defendant Intercepts Benefits Pertaining to Proprietary or Other Entitlements of the Claimant"; RESTATEMENT THIRD, *supra* note 1, at vol. 2, 129–44.

24 *See* MADDAUGH & MCCAMUS, *supra* note 3, at heading 35:500 "Defendant Intercepts Benefits Pertaining to Proprietary or Other Entitlements of the Claimant."

25 80 Mornelle Props. Inc. v. Malla Props. Ltd. (2010), 327 D.L.R. 4th 361 (Can. Ont. C.A.).

tax refund was payable. Under the applicable legislation, the refund was payable to the registered owner of the land. That person was, of course, the purchaser. The former owner successfully sought restitution of the refund from the purchaser. Similarly, a vendor who, after closing, receives benefits accruing to the owner of the property would be liable to account for such receipts to the new owner and American authority so holds.[26]

C. Recovery by the Intended Recipient of Money Mistakenly Paid to a Third Party

As we have seen, English law allows recovery by the intended recipient of monies mistakenly paid to a third party where, in the context of estates administration, the executors have mistakenly paid the wrong party. In such circumstances, the intended beneficiary is entitled to recover from the recipient. English law does not, however, recognize a more general proposition of this kind relating to mistaken payments. American law, on the other hand, has granted relief in such cases well beyond the context of estates administration. Indeed, a rule to this effect was stated in the original 1937 *Restatement* in section 126.[27] The authorities relied upon, as support for the *Restatement* section, deal with situations where the mistaken assumption, if true, would render the plaintiff liable to make the payment in question. Thus, the payer, thinking that he is obligated to pay A, whereas he is in fact liable to pay B, pays A by mistake. In such circumstances, B is entitled to recover from A the mistaken payment. A great variety of authorities are cited in support of this section. They deal, for example, with cases in which a judgment debtor on a claim which is subject to an attorney's lien pays the judgment creditor. In such a case, the creditor is directly liable to the attorney.[28] In another case, the maker of a note mistakenly paid the defendant instead of the holder.[29] The holder has a direct claim against the recipient. A payment is mistakenly made to the mortgagor rather than the mortgagee, and so on.[30] There do not appear to be Canadian authorities to the same effect.

D. Failed Arrangements to Allocate Assets Following Family Dissolution

There are numerous Canadian and American authorities dealing with situations in which a married or co-habiting couple make arrangements upon

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26 King Cty. v. Odman, 111 P.2d 228, 230 (Wash. 1941).

27 RESTATEMENT FIRST, *supra* note 1, at § 126.

28 Sibley v. Cty. of Pine, 17 N.W. 337, 338 (Minn. 1883).

29 Ind. Nat'l Bank v. Holtsclaw, 98 Ind. 85, 88 (1884).

30 Palo v. Rogers, 165 A. 803, 805 (Conn. 1933).

the dissolution of their relationship with respect to the allocation of particular assets—typically insurance or pension benefits—which are then not properly implemented. Thus, it might be agreed that upon dissolution of their relationship, the initial spouse or partner will remain entitled to life insurance benefits. In breach of those arrangements, the insured might designate a new person, typically a new co-habitant, to be the beneficiary of the policy. Upon the death of the insured, the proceeds become payable to the new partner. The former spouse or partner seeks restitution of the proceeds from the recipient. In other cases, the failed implementation might result from a mistake of some kind on the part of the insured or the pensioner. Thus, the insured might have ineffectively attempted to carry out an undertaking or an intention to transfer the insurance benefits to a new partner. As a result of the failed attempt at implementation, the benefits are payable to the former spouse. The former category of case might be characterized as an intentional breach of an undertaking. The latter category will often be a mistake case in the sense that the failed implementation will be accidental rather than intentional.

There is well established American[31] and Canadian authority allowing relief in the breach of undertaking context. The recent and now leading decision of the Supreme Court of Canada in *Moore v. Sweet*[32] is a case of this kind. The plaintiff Michelle Moore was married to Lawrence Moore for more than 20 years. They had three children. In the course of the marriage, in light of Lawrence's unstable employment history and other personal problems, the parties agreed that Lawrence should take out a life insurance policy naming Michelle as beneficiary in order to provide some financial security to Michelle in the event of his passing. Such a policy was taken out by Lawrence. Upon the dissolution of their relationship, Lawrence agreed to maintain Michelle as the beneficiary of the policy and Michelle, in return, undertook to pay the premiums. Michelle did so only to discover, upon Lawrence's passing, that he had breached his undertaking and named his new co-habitant, Risa Sweet, as the "irrevocable beneficiary" of the policy. The Supreme Court of Canada, reversing the judgment below of the Ontario Court of Appeal, granted Michelle's claim against Risa Sweet for the proceeds of the policy. There are several American authorities to the same effect.[33]

Prior to the decision of the Supreme Court of Canada in *Moore v. Sweet*, the leading Canadian authority on point dealt with the second type of situation identified above, that is, a mistaken failure to implement an intention to change the beneficiary of a life insurance policy. In *Roberts v.*

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31 *See* RESTATEMENT THIRD, *supra* note 1, at § 48, illus. 22–26.

32 Moore v. Sweet (2018), 430 D.L.R. 4th 315 (Can. S.C.C.).

33 *See* RESTATEMENT THIRD, *supra* note 1, at § 48, illus. 22.

Martindale,[34] the contest was between the former spouse of the deceased and the deceased's sister. Upon the dissolution of the marriage, the parties had agreed that the husband would relinquish any interest in the estate of his wife. The couple had separated after a lengthy marriage after the deceased became ill. The sister of the deceased cared for her during her illness, and it was the intention of the deceased to confer the benefits of a group life insurance policy upon her. Not only was this her intention, but she thought she had undertaken the necessary steps to achieve this objective. In this she was mistaken, and the benefits remained payable to her husband. Nonetheless, the Manitoba Court of Appeal held that the sister was entitled to impose a constructive trust on the benefits inasmuch as "justice and good conscience"[35] so required. In the Court's view, it was of some significance that the husband had surrendered any rights he might have to the property of the deceased. The problem arises, then, not from a breach of undertaking by the former spouse but, rather, from a failure by the deceased to successfully implement her intention to transfer value to her sister. When considered as a mistaken transfer of value, the *Richardson* case appears to be quite analogous to the mistaken payment problem.

In summary, then, there are a number of Canadian and American authorities providing for restitutionary relief in the context of three-party situations which do not appear to be covered by traditional English doctrine. Generalizations about such cases are not easily articulated. Perhaps one can do no better than the generalization offered in section 48 of *Restatement Third* to the effect that a benefit has been conferred upon the defendant by a third party in circumstances where "(as between claimant and defendant) the claimant has a better legal or equitable right to the payment in question."[36] For present purposes, however, two important points may be noted. First, it is very often the case that there is no proprietary right to the money or other benefits transferred in the claimant to the money or other benefits transferred to the defendant. Thus, the claim to reimbursements paid to defendants in circumstances where the claimant initially bore the expense arises not from a proprietary right but rather from a moral obligation. Second, it is typically the case that the defendant has no knowledge, actual or constructive, of the circumstances giving rise to the nature of the plaintiff's claim. Thus, there is no suggestion in *Moore v. Sweet*, for example, that Ms. Sweet was aware of the arrangements Lawrence had made with his former wife.

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34 Roberts v. Martindale (1998), 162 D.L.R. 4th 475 (Can. B.C. C.A.).

35 *Id.* at para. 24.

36 RESTATEMENT THIRD, *supra* note 1, at vol. 2, § 47. Section 47 deals with claims to recover payments made to the defendant with respect to claimant's property. *Id.* This is said to be an illustration of the broader principle set out in Section 48. *See id.* at cmt. a.

IV. THREE-PARTY CASES AND THE UNJUST ENRICHMENT PRINCIPLE

The unjust enrichment principle, as articulated in *Restatement First*, holds that "[a] person who has been unjustly enriched *at the expense of* another is required to make restitution to the other."[37] There is a risk, in Canadian and English jurisprudence at least, that literal or rigid interpretation and application of that principle will create unnecessary difficulties in three-party cases. A literal interpretation and application of the element of "at the expense of," would exclude some three-party cases from coverage by the principle. Thus, in *Moore v. Sweet*,[38] for example, the monies were paid to Risa Sweet by the insurer and not by the claimant Michelle Moore. If "at the expense of" is interpreted narrowly or literally as meaning at the "out-of-pocket" expense of the plaintiff, this element is not present on these facts. Similarly, in the tax reimbursement cases, it might be argued that the reimbursement is "at the expense of" the taxing authority rather than the plaintiff. This is clearly not a problem or potential problem in American law. It is obvious from the contents of the *Restatement First*, that the unjust enrichment principle was not being interpreted so literally and further that it was not the case that its authors were of the view that all of the lines of authority collected in *Restatement First* could be explained on the basis of the unjust enrichment principle if it were to be narrowly construed in this fashion. Thus, the *Restatement First* includes all of the law of fiduciary obligation even though, in some cases at least, profits or benefits acquired through breach of fiduciary duty may not be at the expense of the plaintiff in this narrow sense.[39] Obviously, the terms "restitution" and "unjust enrichment" were being used somewhat loosely by the *Restatement*'s authors to capture all cases of benefits unjustly retained by a defendant (whether or not they were directly acquired from the pocket of the plaintiff).

The risk that narrow interpretation of "at the expense of" the plaintiff might cause difficulty in three-party cases is largely attributable to the work of the late Professor Peter Birks. Although Birks' views on these definitional issues evolved over time, in the latest version of his views—written, some would say, in his "more dogmatic and less compelling"[40] phase—Birks pronounced that "unjust enrichment" could only be properly understood if "at the expense of" was narrowly and literally interpreted to refer only to cases where value had been transferred from the plaintiff to the defendant.[41]

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37 RESTATEMENT FIRST, *supra* note 1, at vol. 1, § 1 (emphasis added).

38 Moore v. Sweet (2018), 430 D.L.R. 4th 315 (Can. S.C.C.).

39 *See, e.g.*, RESTATEMENT FIRST, *supra* note 1, at § 197, cmt. c ("Where no harm to beneficiary").

40 Gerard McMeel, *What Kind of Jurist Was Peter Birks?*, 19 RESTITUTION L. REV. 15, 28 (2011).

41 Peter Birks, *Misnomer*, *in* RESTITUTION: PAST, PRESENT AND FUTURE (William Cornish et al. eds., Hart Pub., 1998).

Indeed, it was his view that the loose usage of the concept had essentially "wrecked"[42] the project of Seavey and Scott in writing the *Restatement First* of "Restitution." They had incorrectly included both cases of direct transfer together with cases of what Birks would refer to as "restitution for wrongs" which, as in the case of fiduciary obligation, include both direct transfers and cases where the defendant has acquired benefits from third parties. Thus, for Birks, the subject-matter of *Restatement First* can only be properly understood if it is subdivided into a number of new branches of the law. The first would be true "unjust enrichment," and the second would be "restitution for wrongs." As, in his view, not all of the restitution cases were embraced by these two new branches of the law, there needed to be a third—tentatively titled "Miscellaneous"—under which the left-overs would be gathered together.[43] It is not necessary to explore these eccentric views further for present purposes. The critical point is that there is an element of English thinking and writing about unjust enrichment that treats the concept rather narrowly as applicable only to cases involving direct transfers from plaintiff to defendant and, as Canadian experience demonstrates, such thinking could create difficulties in the analysis of three-party cases.

Canadian experience on this point is complicated by the fact that in a leading case,[44] and for reasons that remain unclear, Judge Dickson, a future Chief Justice of Canada, articulated the unjust enrichment principle idiosyncratically as involving three elements—a benefit to the defendant, a "corresponding deprivation" to the plaintiff, and "no juristic reason" for the transfer.[45] We will return below to the "no juristic reason" element. With respect to the "at the expense of" element, however, we note that Judge Dickson substituted the concept of "corresponding deprivation" of the plaintiff. This re-working of "at the expense of" appears to call for a narrow or literal restriction of recovery to cases where benefits have been transferred directly from plaintiffs to defendants. As suggested above, such a restriction could pose problems in three-party cases and such problems have, indeed, surfaced in the Canadian jurisprudence.

Thus, in *Moore v. Sweet*[46] itself, the defendant argued that the benefits were conferred upon the defendant Sweet, not by the plaintiff Michelle Moore but by the insurer. Hence, there was no "corresponding deprivation"

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42 Peter Birks, *A Letter to America: A New Restatement of Restitution*, 3 GLOBAL JURIST FRONTIERS 2 (2003).

43 PETER BIRKS, UNJUST ENRICHMENT 22 (Oxford Univ. Press 2d ed. 2005) (mentioning only *negotiorum gestio* and maritime salvage as possible components of this new branch of the law but declining to enumerate further "since to enumerate all of its members requires encyclopedic erudition"). Unsurprisingly, a treatise on "miscellaneous" has not yet materialized.

44 Pettkus v. Becker, [1980] 2 S.C.R. 834 (Can.).

45 *Id.* at 848.

46 Moore v. Sweet (2018), 430 D.L.R. 4th 315 (Can. S.C.C.).

to the plaintiff. An argument to this effect appeared to enjoy some success below in the Ontario Court of Appeal.[47] Fortunately, the Supreme Court of Canada reversed and took a broader view of the concept of "corresponding deprivation." In the Court's view, it was sufficient to establish a "corresponding deprivation" that the benefits that had accrued to the defendant would or should otherwise have accrued to the plaintiff. This was obviously the case in *Moore v. Sweet*, and the corresponding deprivation test was met. Were it not for the third party's breach of undertaking, Michelle would have received the proceeds. Her "deprivation" was the failure to receive them. A similar analysis should apply, presumably, to a court interpreting the traditional wording of the "at the expense of" elements.

Turning to the Canadian "no juristic reason" test, this element may also create difficulty in three-party cases. Parenthetically, we may note that the source of this element remains quite obscure. It is not found in the law of other jurisdictions or in the academic literature. It obviously is designed to replace the "unjust" element in the unjust enrichment principle. It seems possible—indeed I think it is likely—that Judge Dickson was attempting to assure his colleagues, whose scepticism about unjust enrichment was evident,[48] that he was not simply invoking abstract notions of "justice" or "injustice" but was, rather, relying on a more precise or at least more lawyerly principle of absence of "juristic reason." The problem, of course, is that "absence of juristic reason" is not a particularly precise or helpful notion. It obviously embraces the well-known concepts that benefits transferred as a gift or under a binding agreement or because the transfer is required by law are not recoverable. It must be said, however, that this is a rather obscure way of referring to them. But, beyond these well-known categories of "juristic reason" for a transfer, it is not at all clear what the concept means. In the three-party context, there is a risk that where the third party was directed by a statute or agreement to pay the defendant, relief might be denied on the basis that the agreement or statute provided a "juristic reason" for the transfer. Thus, in the tax reimbursement cases, the statute typically commands that the defendant be paid. The problem is that the plaintiff bore the initial burden of paying the tax. In the cohabitation/insurance cases, the insurance contract, perhaps reinforced by statute, requires that the insurer pay the proceeds to the defendant. This problem did in fact arise in *Moore v. Sweet*. The governing statute clearly indicated that the insurer should pay the "irrevocable beneficiary," Ms. Sweet. Arguably the statute constituted a "juristic reason" for the transfer and recovery should, therefore, be denied. This type of argument had succeeded in earlier Canadian jurisprudence[49] and in the Court

47 *See id.* at paras. 70–75 (though the claim was rejected on other grounds).

48 *Pettkus*, 2 S.C.R. at 836 (Martland, J., dissenting) ("palm tree justice").

49 *See, e.g.*, Wilson v. Wysosk (2014), 98 E.T.R. 3d 298 (Can. B.C. S.C.).

of Appeal below.[50] Fortunately, the Supreme Court of Canada rejected this argument in *Moore* and held that such statutory arrangements would preclude relief only in circumstances where the statute plainly indicated that it not only required the payment to the defendant but clearly and unambiguously excluded restitutionary relief to a person in the position of Michelle Moore. In short, the existence of an explanation for the fact that the monies were paid to the defendant does not necessarily create a "juristic reason" for the transfer that precludes restitutionary relief. A similar analysis would apply, presumably, to the tax reimbursement cases. In short, for Canadian purposes, *Moore v. Sweet* appears to have solved the "juristic reason" problem in three-party cases, enabling Canadian courts to achieve results similar to those found in American jurisprudence.

V. LESSONS FOR ENGLISH JURISPRUDENCE FROM AMERICAN AND CANADIAN EXPERIENCE

If one accepts the attractiveness of the results in Canadian and American three-party restitution cases briefly canvassed above, it might be suggested that there are a few lessons that could be carried into modification of the traditional English position in cases of this kind.

First, these cases might be considered to lend support for the proposition that liability in English three-party cases should generally be considered to be strict. That is to say, there does not appear to be a convincing basis for precluding liability in cases where the recipient is completely unaware of the circumstances giving rise to the plaintiff's claim, provided that the legitimate interests of an innocent recipient are protected by the defenses of *bona fide* purchase and change of position. Arguably, then, the constructive knowledge requirement in "knowing receipt" cases should be abandoned.[51]

Second, it is abundantly clear from the Canadian and American cases that no proprietary link is necessary in order to justify restitutionary relief in three-party cases as a general matter. Many of these cases would involve situations where, if it were not for the intervention of the third party, the asset in question would have been acquired by the claimant. Thus, if Lawrence Moore had not breached his undertaking to Michelle, the insurance benefits would have been paid to her. As we have seen, the Supreme Court of Canada held that this was sufficient to establish that the benefit acquired by Risa

50 *See Moore*, 409 D.L.R. 4th at 27, paras. 76–99.

51 An alternative suggestion, achieving the same result, would be to reserve "knowing receipt" for truly fault-based liability involving receipt with knowledge of the misconduct and, at the same time, recognize a simple restitution claim for assets received which would be strict in nature. In this view, "knowing receipt" need not require continuing possession of the assets received and could, where applicable, give rise to a damages or account of profits claim. *See* Eloise Bant & Michael Bryan, *Outflanking Barnes v Addy? The Persistence of Strict Recipient Liability*, 11 J. EQUITY 271 (2017).

Sweet was acquired "at the expense of" Michelle Moore, and in the current Canadian jargon, at the "corresponding deprivation" of Michelle and thus provided the basis for an unjust enrichment claim. One might argue, perhaps, that in such circumstances funds transferred to Risa might be held in equity for Michelle and, accordingly, that an equitable proprietary link is established. At no point, however, did the Supreme Court suggest that Michelle was the owner of the funds acquired by Risa. The claim would not fail if the funds had been irretrievably mixed with the other funds by Risa. But even this analysis is not applicable to other cases in which meritorious claims have been allowed. Thus, in a typical tax reimbursement case, there is nothing to suggest that the taxing authority should have reimbursed the person who bore the burden of the tax. Nor is there any basis for suggesting that the funds paid to the recipient are owned by the person who has actually borne the burden of the tax. Nor do the courts granting recovery suggest that there is a proprietary link of this kind. Recovery is allowed simply because fairness requires that the monies be repaid to the person who initially bore the burden of the expense in question. In short, the Canadian and American cases offer some support for the proposition that a proprietary link between the claimant and the asset received by the defendant should not be considered to be an indispensable requirement in three-party cases.

Third, American experience strongly suggests that the rule in *Re Diplock* ought to be generalized to deal with mistaken payments in a more general way. American jurisprudence allows recovery by an intended recipient more generally in circumstances where monies have been paid by mistake to the wrong party. To be sure, the typical mistake in American three-party mistaken payment cases involves a "liability mistake." That is, the payer mistakenly believes that he is liable to make the payment to the recipient. It therefore may be asked whether the rule should be extended to mistaken gratuitous transfers. Here, the *Richardson Estate*[52] case may be of some assistance. At bottom, *Richardson* is a case where a party mistakenly makes a gift of insurance proceeds to one party in circumstances where they had intended to effectuate a transfer of those benefits to a new party. It appears to be the case in all three jurisdictions, that mistaken payments intended as a gratuitous transfer can be recovered by the mistaken payer.[53] There would appear to be no reason, in principle, why mistaken transfers in three-party cases should not similarly be subject to restitutionary relief in favour of the intended recipient of a mistaken gratuitous transfer.

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52 Roberts v. Martindale (1998), 162 D.L.R. 4th 475 (Can. B.C. C.A.).

53 B.M.P. Global Distribution Inc. v. Bank of Nova Scotia, [2009] 1 S.C.R. 504, 506 (Can.); Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd. [1979] 3 All ER 522 at 523 (Eng.); RESTATEMENT THIRD, *supra* note 1, at § 45.